

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RANDY R. HARMS,

)

4:09CV3117

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Petitioner,

)

)

v.

)

**MEMORANDUM
AND ORDER**

)

ROBERT HOUSTON,

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)

Respondent.

)

This matter is before the court on Petitioner's Motion for Certificate of Appealability and Motion for Leave to Appeal In Forma Pauperis ("IFP"). (Filing Nos. [15](#) and [16](#).) On February 10, 2010, the court dismissed Petitioner's habeas corpus claims with prejudice and entered judgment against him. (Filing Nos. [13](#) and [14](#).) Petitioner thereafter filed a timely Notice of Appeal. (Filing No. [15](#).)

I. Motion for Leave to Appeal In Forma Pauperis

Petitioner is a prisoner who has not previously been granted leave to proceed in forma pauperis ("IFP"). [Federal Rule of Appellate Procedure 24\(a\)\(1\)](#) provides that a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

[Fed. R. App. P. 24\(a\)](#).

Here, Petitioner filed a Motion for Leave to Appeal IFP (filing no. [16](#)) and a Prisoner Account Statement (filing no. [17](#)). After considering these documents, the court grants Petitioner provisional leave to appeal IFP.

II. Motion for Certificate of Appealability

Before a petitioner may appeal the dismissal of a petition for writ of habeas corpus, a “Certificate of Appealability” must issue. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), the right to appeal such a dismissal is governed by [28 U.S.C. § 2253\(c\)](#), which states:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court;

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).¹

¹Similarly, [Fed. R. App. P. 22\(b\)](#), as amended by AEDPA, indicates that in an action pursuant to [28 U.S.C. § 2254](#), a notice of appeal triggers the requirement that the district judge who rendered the judgment either issue a certificate of appealability or state the reasons why such a certificate should not issue. See generally [Tiedeman v. Benson](#), 122 F.3d 518, 521 (8th Cir. 1997).

A certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right. See [28 U.S.C. § 2253\(c\)\(2\)](#). Such a showing requires a demonstration “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” [Slack v. McDaniel, 529 U.S. 473, 484 \(2000\)](#) (internal quotation marks omitted) (citing [Barefoot v. Estelle, 463 U.S. 894 \(1983\)](#) (defining pre-AEDPA standard for a certificate of probable cause to appeal)).

“Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” [Slack, 529 U.S. at 484](#). Similarly, if the district court denies a petition for writ of habeas corpus on procedural grounds without reaching the underlying constitutional claims on the merits:

[A] COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and . . . would find it debatable whether the district court was correct in its procedural ruling Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted.

[Id.](#)

The court has carefully reviewed the record and Petitioner’s Motion for Certificate of Appealability. (Filing No. [15](#).) Petitioner has failed to demonstrate that reasonable jurists would find this court’s ruling debatable or wrong. For the

reasons stated in its February 10, 2010, Memorandum and Order (filing no. [13](#)), the court declines to issue a Certificate of Appealability.

IT IS THEREFORE ORDERED that:

1. Petitioner's Motion for Leave to Appeal IFP (filing no. [16](#)) is granted.
2. Petitioner's Motion for Certificate of Appealability (filing no. [15](#)) is denied without prejudice to reassertion before the Eighth Circuit.
3. The Clerk of the court shall provide the Court of Appeals a copy of this Memorandum and Order.

DATED this 10th day of March, 2010.

BY THE COURT:

Richard G. Kopf
United States District Judge

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